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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

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CONVERS E. MARSH,
PETITIONER,

VS.

THE STATE OF KANSAS,
RESPONDENT.

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## PETITION FOR WRIT OF CERTIORARI
## TO THE SUPREME COURT OF KANSAS.

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DONALD I. MITCHELL,
802 Schweiter Bldg.,
Wichita, Kansas;

RUSSELL SHULTZ,
LARRY KIRBY,
JAMES NELSON,
331 South Hydraulic,
Wichita, Kansas;

Counsel for Petitioner.

KANSAS LAW PUB. CO., TOPEKA

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## PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

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To the Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

Convers E. Marsh, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kansas entered in the above entitled case June 6, 1964, rehearing denied July 14, 1964 and decision spread of record on July 16, 1964. Upon consideration of the application of counsel for petitioner, it was ordered that the time for filing a petition for writ of

certiorari be extended to and including December 13, 1964, by order of the Honorable Byron R. White, Associate Justice of the Supreme Court of the United States, dated the 15th day of October, 1964.

## OPINION BELOW.

The opinion of the Supreme Court of Kansas in this criminal appeal appears as *State of Kansas v. Marsh*, 193 Kan. 302, 392 P. 2nd 953 (1964) and is reproduced in Appendix A to this petition.

## JURISDICTION.

The jurisdiction of this Court rests on 28 U.S.C. Sec. 1257, the pertinent portion of which provides:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: . . . (3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . The United States.

## QUESTIONS PRESENTED.

1. Whether it constituted a violation of the Fourth Amendment to the Constitution of the United States for police officers, without warrant and with guns drawn, to enter a motel unit, rented and occupied by the petitioner, and for the officers to conduct a search and to seize certain articles found therein, taking into account the manner in which the entry was made, the manner and surrounding circumstances in which the search was conducted, and the facts shown to be within the knowledge

of the officers at the time of the entry and at the time the search was begun.

2. Whether it constituted a violation of the due process clause of the Fourteenth Amendment to the Constitution of the United States for the trial court to admit into evidence, over appropriate and timely objection, testimony and exhibits which were products of the search and seizure referred to above, when such testimony and exhibits were of such a nature as to be materially prejudicial to the cause of the petitioner herein.

3. Whether it constituted a violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States, for the Supreme Court of the State of Kansas to refuse to review and decide on its merits the appeal of the petitioner herein, considering the scope and nature of the information presented to the Court on appeal, the flagrant deprivation of the petitioner's rights, the Constitution and Laws of the State of Kansas, and the Court's prior actions where a like question was presented.

## CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the Constitution of the United States, Sec. 1:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## PREFATORY STATEMENT.

Four police officers, guns in hand, having no knowledge of who or what would be found, having no description of the persons being sought, and having no warrant for either arrest or search, entered "as near as possible at the same time" into a motel unit which was rented and occupied by the Petitioner. Subsequently, in the course of the trial, a pretense that an "invitation" by the Petitioner preceded their entry was made by the two officers who testified, but the nature of the "invitation" differed radically in the testimony of each officer. The facts, which will hereinafter be brought out with particularity, cannot fairly be interpreted as other than a flagrant violation of the Petitioner's basic and precious rights, as guaranteed by the Constitution of the United States, by some well-meaning but over-zealous police officers.

It appears now to be beyond dispute that:

1. Meaningful enforcement of the Fourth Amendment requires the exclusion of evidence seized in an illegal search, and this principle applies to proceedings in State Courts as well as Federal Courts.

2. An occupant of a temporary dwelling place, such as a hotel or motel room, is no less entitled to constitutional protection against unreasonable search and seizure than is the occupant of a house.

3. There will be no presumption of waiver of a constitutional right, and the burden is on the prosecution to show by clear and convincing evidence that there has been a specific and voluntary waiver given, in the absence of any actual coercion; and that there must be an intentional relinquishment of such right shown, before such right can be deemed to have been waived.

4. It is fundamentally unfair for a State to convict a person on a basis of evidence obtained by an unlawful search and seizure, and a conviction cannot stand if there is a reasonable possibility that any evidence seized by means of an unconstitutional search might have contributed to the conviction.

5. Mere acquiescence or consent, in the face of announced or apparent intent by officers to search with or without warrant or permission, does not constitute a waiver of the constitutional right.

6. In determining the lawfulness of entry and the existence of probable cause supporting an arrest without warrant, the Court must concern itself only with what the arresting officers had reason to believe at the time of their entry.

7. A search or arrest, unlawful at its inception, is not validated by what it turns up.

The Petitioner will show that every reasonable effort was made to exclude from evidence the products of this

unlawful search and seizure; and the basis for its not having been excluded appeared to have been the belief of the Trial Court that it makes no difference whether a search was made prior to or after an arrest, provided both events take place within close proximity in time, even though it was shown that the arrest was predicated on that which was disclosed by the search.

The Petitioner will further show that a Motion for New Trial was properly and timely made, that the basis for such motion included the improper admission of evidence which was the product of the unconstitutional search and seizure, that the point was unmistakably specified in the argument on the motion, and that the motion was overruled.

The Petitioner will also show that proper Notice of Appeal was given to the prosecutor, that said notice stated specifically that the appeal was being taken "from the order of the Court overruling this Defendant's motion for a new trial," and that the prosecutor acknowledged service of said notice.

The Petitioner will finally show that the Supreme Court of Kansas, in rejecting Petitioner's appeal, did so in an arbitrary and capricious manner, in wanton disregard of the very grave issues presented and within its knowledge, despite Petitioner's effort to correct the very formal procedural error of which the Court complains, in violation of the Constitution and Laws of the State of Kansas, and in contravention of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

## STATEMENT OF FACTS.

About 11:45 on the night of May 6, 1963, two men robbed a supermarket at 1640 South Broadway, Wichita, Kansas. (T. 31)

Shortly after the robbery, Officer Flowers of the Wichita Police Department heard a commercial radio broadcast indicating that a robbery had occurred at the address indicated. He then, from a radio in a police car, received some unspecified "description of the automobile involved" and a license number. He then learned, apparently by police radio, that "Officer Crawford . . . had located a car bearing the license number that we had been alerted to watch for." (T. 65)

Proceeding to that location, where there was a motel, Officer Flowers allegedly "verified the type, color of the automobile, and verified the license number in it." (T. 65-66)

But then, immediately following, he testified, "Immediately after this Lt. Siders arrived. We checked to determine what part of the motel this automobile was at . . . " (T. 66) (Hence, the "verification"—what it consisted of, by what means or through whom it was obtained —remains very much in question.) Officer Flowers subsequently admitted under cross-examination that he did not know whether the license number he received on the radio actually matched that of the automobile found at the motel. (T. 91)

(No testimony was ever introduced, through Officer Flowers or any other witness, which would indicate the origin of the "description of the automobile involved"

with its associated license number; i.e., there is no indication in the evidence as to whether an automobile of this description and bearing this license was seen at the location of the robbery, was seen fleeing from the scene of the robbery, or how it was in any way connected with the robbery in question.)

Officer Flowers then proceeded to question "the gentleman that was managing the motel" as to whom the automobile in question belonged, "but he couldn't answer it for me. He didn't know whether it was unit 17 or 18. And his wife had retired, apparently, and he asked her and relayed information to me that that automobile *was supposed to be* with the people of unit 18. (T. 66) (The only specific information as to the location of the vehicle in question, given in the testimony of Sgt. George A. Love, is that " . . . it was in front of cabin No. 17 . . . ") (T. 135)

Having in their possession the foregoing information, and only this information, as shown by the record, the four officers (Officer Flowers, Lt. Siders, Officer Crawford, and Officer Worthan) went to the door of unit 18. (T. 106) Officer Flowers pounded on the door with his gun. (T. 66) What followed is known only from Officer Flowers and Lt. Siders, the only officers who testified. And, possibly because each was excluded from the courtroom while the other testified, (T. 5, 6) their accounts vary materially on certain very important points.

Officer Flowers testified, " . . . the boys from within asked who it was, and I merely said, 'Flowers.' They asked me again who it was and I said, 'The Police.' And

at this time the door was opened by Mr. Marsh and he invited us in . . . by gesture in opening the door, stepping back (indicating) and then wanted to know what we wanted. With this I again (sic) informed him that it was necessary that we talk to them and we proceeded to check the unit." (T. 66, 67) Later, on cross-examination, Officer Flowers testified that he answered Mr. Marsh's question by saying, "I told him that we wanted to look the place over." Also on cross-examination, " . . . I told him we wanted to check on a matter; that we would inform him in a minute. I moved into the combination shower-toilet, looked back around into the closet. And at that point I saw the ammunition for an automatic. I asked whose it was. I didn't get any answer. I come back into the room and checked the one drawer in the dresser and found a P-38 automatic; asked whose it was. I didn't get any answer." Then, " . . . I started talking with Mr. Morrell, and about this time Mr. Marsh reached down and picked up a part bottle of whiskey and took a drink and I told him to set it down and leave it alone till we were through." (T. 80, 81) Officer Flowers testified that he did not have any conversation with Mr. Marsh relative to any automobiles and did not believe that he was present when anyone else did. (T. 82)

Lt. Siders testified that he had been invited to enter the motel room by a " . . . male voice inside saying, 'Come in,' and the door opened from the inside." (T. 122) He also testified that when he first saw the Petitioner, Mr. Marsh, that he was " . . . standing beside the bed which is in the middle of . . . the room . . . and he was

very nervous." (T. 123) Also, he said, " . . . I don't know who opened the door." (T. 124) In answer to the question as to what the officers wanted, Lt. Siders testified, " . . . I told him that we had something that had happened and we needed to check it out, and if we found out they weren't involved, they could just forget it." He testified that the Petitioner replied, "Help yourself." (T. 107)

The testifying officers are in harmony, however, in agreeing that the officers entered the motel unit with guns in hand, (T. 85, 86, 123) that the guns were in view of the occupants at the time the door was opened, (T. 86) and that the four officers entered two-abreast and as nearly together as possible. (T. 121, 122) It is also undisputed that, upon entering the motel unit, the officers immediately embarked upon a search, (T. 80) that they did not question the occupants about the car outside, (T. 82) nor anything else concerning which they had any knowledge at the time of entry, and both officers indicated that no arrest was made until after the search revealed some ammunition and a gun. The officers agree that the arrest was predicated, at least in part, on what was found in the search which preceded the arrest. (T. 88, 89, 125) One officer testified that he would have arrested the occupants regardless of what was found in the search; but, under cross-examination, stated, "We weren't sure we were in the right unit till we checked." (T. 126) And, in response to the question, "Which is to say you had to search the place before you would be certain who

you wanted to arrest, is that correct?''—the officer replied, ''Well, that helps a great deal, right.'' (T. 126)

After finding the ammunition and gun, the officers arrested the three occupants of the motel unit and conducted a more exhaustive search of the premises and of the persons of the occupants. The search also extended to an automobile which was parked in front of unit 17. The occupants of unit 18 were transported to jail, and the search and seizure of property in the motel and in the automobile in front of unit 17 continued after Petitioner and his companions were taken away. (T. 120, 127, 128, 134, 135)

Some two to four hours after the robbery the Petitioner and another man were ''identified'' in a police ''lineup'' by two store employees, who later testified that the two who were identified were the only ones in the ''lineup'' who were dressed alike, that their manner of dress was not the same as when the robbery took place, that other persons in the ''lineup'' did not resemble the descriptions they had given the police, and that only the lower portion of the faces of the persons who robbed the store could be seen at the time of the robbery because of straw hats and dark glasses.

Throughout Petitioner's trial on charges of first degree robbery, the Petitioner's counsel objected to the introduction of evidence, consisting either of testimony or exhibits, pertaining to guns, ammunition, money, or other items found during the search of the motel unit, some of which were found while the Petitioner was in the unit and some of which were found in the motel unit after the

Petitioner was arrested and taken away. Petitioner's counsel objected that the testimony and exhibits referred to were the products of an illegal search and seizure, and in the absence of a search warrant, but his objections were overruled. Evidence introduced included not only a gun found in a dresser drawer shortly after the entry of the officers into the motel unit, but also a revolver, ammunition, money and other items found in a suitcase in the motel unit after Petitioner had been arrested and taken away. Evidence was also introduced, over Petitioner's objection, pertaining to items found in a station wagon and in another automobile parked near the motel unit, despite the fact that there was no showing that either of the vehicles was owned by, or used by, the Petitioner.

Testimony was given that unit 18 was rented by the Petitioner and a companion, and that they had exclusive control of it at the time of the search and seizure. (T. 63)

The jury returned a verdict of guilty as charged. Petitioner's counsel filed a motion for a new trial, complaining, *Inter Alia,* that the Court had admitted illegal testimony. In the oral argument on the motion, on October 23, 1963, Petitioner's counsel specifically complained " . . . that the Court has admitted illegal testimony, which is with reference to the testimony regarding the things found at—or during a search, which it is the position of the defendant, was illegal." (Proceedings on Motion for New Trial, Page 2). In connection therewith Petitioner's counsel cited Mapp v. Ohio, and stated that the "oral testimony and physical evidence . . . should have been suppressed as a result of the illegal search and seizure."

(Proceedings on Motion for New Trial, Page 5.) At that point counsel also specifically cited the Fourth Amendment and the Fourteenth Amendment. The prosecutor answered in such a manner as to indicate that he felt there was a lawful arrest, that one of the arresting officers would have arrested the occupants regardless of what was found, and that, "The only thing that was found before the arrest anyway was a box of P-38 Luger ammunition which was never introduced in evidence; and the P-38 Luger, itself, which was." (Proceedings on Motion for New Trial, Page 9). The Motion for New Trial was overruled.

Petitioner filed his Notice of Appeal, wherein he stated that the appeal was being taken "from the order of the Court overruling this Defendant's Motion for a new trial." Service of the foregoing was acknowledged by the Prosecutor.

The appeal was set for hearing on April 9, 1964.

On March 16, 1964, Petitioner filed in the Supreme Court of Kansas his combined Abstract and Brief, showing on page 29 thereof a copy of the Notice of Appeal, stating, " . . . the defendant . . . does appeal to the Supreme Court of Kansas . . . from the judgment rendered . . . on the 23rd day of October, 1963 . . . and from the order of the Court overruling this Defendant's motion for a new trial." In said Abstract and Brief, the Petitioner showed under the heading *Specifications of Error, inter alia,* "Was the search and seizure made at the motel room of the appellant unlawful, and was the evidence thereby seized inadmissable because no search warrant was ob-

tained?" On page 31 of said Abstract and Brief, the Petitioner stated, "Prior to impaneling of the jury, during the course of the trial and after the completion of State's evidence, the defendant moved to suppress all of the evidence obtained by a search and seizure of himself and his motel unit on the grounds that said search and seizure was unlawful and made without probable cause and without a warrant." On the following page, page 32, Petitioner stated, "The appellant has appealed to this court on the basis that the search and seizure . . . was in violation of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution and Section 15 of the Bill of Rights to the Kansas Constitution . . . " Said Abstract and Brief proceeds to show the course of events pertaining to the search and arrest of the Petitioner, the testimony adduced concerning these matters, the nature of the evidence thus unlawfully obtained, the efforts of the Petitioner to suppress this evidence, the failure of the Court to rule appropriately concerning said evidence, the law pertaining to arrest and to search and seizure, authorities in support of Petitioner's contentions, and in conclusion on page 57 states, "If the court finds in favor of the State on the foregoing questions, then . . . the defendant *should still be granted a new trial* on the basis that the evidence seized and subsequently introduced in evidence was not either (a) the fruits of a crime and thus subject to seizure, or (b) no connection was shown between the exhibits complained of by the defendant and the defendant." The only matter not specifically set forth, and that which was seized upon by

the prosecution and by the appellate court as the basis for a finding adverse to the Petitioner, was the failure to set forth specifically under the heading "Specifications of Error" these words: "The Trial Court erred in overruling the Defendant's motion for a new trial."

On April 3, 1964, six days before the matter was scheduled for hearing in the Supreme Court of Kansas, the Petitioner was served with a copy of the State's Brief, which was filed the following day with the clerk of the Supreme Court of Kansas. The Appellee's Brief states on page 1, "Appellant appeals from the trial court's order overruling Appellant's Motion for a New Trial, and the subsequent sentence imposed on the Appellant." The Appellee then quotes the Appellant's Motion for a New Trial as saying, "1. The Court has admitted illegal testimony . . . " Thus, showing that he was fully aware of the basis for the appeal, the Appellee still complains that there was no "proper Specification of Error" and that, therefore, "there is nothing before the Court for review." The Appellee continued, nevertheless, to argue quite fully the facts and the law, addressing himself to the questions of the validity of the arrest of the Petitioner and the search of the motel unit, contending that the arrest of Petitioner was with probable cause and that the search was not an unreasonable one, thus going to the heart of the real issues in this case. Appellee sought to show (by misquoting the evidence) that the officers had sufficient information at the time of entry into the motel to justify an arrest without Warrant, that the officers were invited into the motel unit, that there was a

specific consent to the search by the Petitioner, that the search without Warrant was reasonable under the circumstances—and that, even if the search and seizure were illegal, the evidence not complained of was sufficient to sustain the verdict. What more could the Appellee have offered if the Appellant had included under the heading *Specifications of Error* the words "The Court erred in overruling the Defendant's motion for a new trial"?

In order to correct this formal error, however, Petitioner presented to the prosecutor on April 8, 1964, three days after the filing of Appellee's Brief in the Supreme Court of Kansas, a proposed amendment to the Appellee's combined Abstract and Brief, adding under the heading *Specifications of Error* that the trial court erred in overruling the motion for a new trial. The Deputy County Attorney, upon whom this was served, acknowledged the receipt thereof and subscribed his name to the following: " . . . a copy of Appellant's correction of typographical or printing omissions in his abstract or brief and amendment including same, have been received on this 8th day of April, 1964, and I hereby consent to the same." Thereafter, on the following day, before the hearing on the appeal, the Petitioner moved the Court to amend Petitioner's Abstract and Brief in the manner indicated, so as to add thereto, under the heading *Specifications of Error,* the words which had previously been inadvertently omitted, indicating that the trial court had erred in overruling Defendant's motion for new trial. This request, to amend the abstract by adding those words, was "taken under advisement," but was later denied as having come "too late."

Subsequently, resting its decision entirely on Petitioner's "failure to specify as error the order overruling his motion for new trial," the Supreme Court of Kansas under date of June 6, 1964, held that the appellate jurisdiction of that court was not invoked and that "there was no federal question before us for decision." On July 14, 1964, rehearing was denied.

## A STATEMENT AS TO THE RECORD INVOLVED IN THIS CASE.

The record which is abstracted in this petition consists of the following:

1. The certified transcript of the proceedings on October 8 and October 9, 1963, in the criminal case of State of Kansas v. Convers E. Marsh, No. CR-40 in the District Court of Sedgwick County, Kansas, Division No. 5, Hon. James J. Noone, Judge, presiding. All references to this record, as abstracted in this petition, are referred to in this petition as follows: (T. ____).

2. The certified transcript of the proceedings on October 23, 1963, in the criminal case of State of Kansas v. Convers E. Marsh, No. CR-40 in the District Court of Sedgwick County, Kansas, Division No. 5, Hon. James J. Noone, Judge, presiding, such proceedings relating to Defendant's Motion for New Trial. All references to this record, as abstracted in this petition, are referred to in this petition as follows: (Proceedings on Motion for New Trial, Page ____)

3. The combined Abstract and Brief of Appellant in his appeal to the Supreme Court of Kansas in State of Kansas v. Convers E. Marsh, No. 43859, is abstracted in

this petition with reference as follows: (Appellant's Abstract and Brief, Page ____)

4. The brief of the Appellee in the Supreme Court of Kansas in State of Kansas v. Convers E. Marsh, No. 43359, is abstracted in this petition with reference as follows: (Appellee's Brief, Page ____)

## SUMMARY OF ARGUMENT.

The trends of recent years, toward giving reality, meaning, and substance to constitutional rights, have been worse than ignored in the instant case. The courts of Kansas have, in this instance, not only failed to extend to the Petitioner the constitutional guaranties, but have also flouted the tradition, long a cardinal principle in our system of jurisprudence, of interpreting statutes, where some degree of ambiguity exists, in that manner which is most favorable to the defendant in a criminal case. The interpretation given by the Kansas Supreme Court, in its strained effort to uphold the unjustified conviction in the trial court, has worked a travesty on the Petitioner's rights and has made a mockery of the Constitution of the United States and the Constitution of the State of Kansas.

The Supreme Court of Kansas has said, in effect, "Since you, through your counsel, have failed to use a particular sentence on a particular page in appealing to us, we shall deny you all relief and shall refuse to consider the questions you have actually brought before us— even though the police and the trial court may have deprived you of your constitutional rights— and even though

the deprivation of those rights has resulted in your facing a term of years in prison."

The actions of the police and of the courts in this case is but another example of making a distinction between "good guys" and "bad guys"—and of exercising the viewpoint that "bad guys" are not really entitled to the same rights as are other persons.

The police, having decided that someone in a motel unit may have been involved in a robbery, but not sure who or what they were looking for, and not knowing whether they were in the "right place," burst in upon the Petitioner with drawn guns. But, once there, they found certain items which convinced them that they were in the "right place"—and, thus convinced, the police concluded that the Petitioner was a "bad guy," one whose conviction was the thing of paramount importance, and that nothing should stand in the way of his conviction—that the end would justify any means.

The trial court, seemingly sharing this single-minded purpose of convicting a "bad guy," saw fit to overrule the many-times-repeated objections to evidence, terribly damaging evidence, which had been obtained by unlawful means and through the flagrant denial of the Petitioner's constitutional rights. And, essentially *pro forma,* the trial court overruled Petitioner's Motion for New Trial.

The appellate court, certainly not one to set aside a conviction of a "bad guy" if it can in any manner be avoided, seized upon a very technical error in the form of the appeal—so as to avoid the issues which were clearly be-

fore it—and which were, as shown by the appellate court's own written opinion, presented quite intelligibly to that court.

The question now before this court is, basically, whether or not the rights and privileges granted by the Constitution of the United States are real things, things of substance and permanence and ubiquity—or whether, in select instances, they can be ignored. Is it enough that there be a formal showing of "due process"—a burlesque, a satire, a caricature—a play in which we decide ahead of time to "give the defendant a fair trial and then hang him"? Or will police agencies and courts be required to make the constitutional rights and privileges living realities to which *all* men are entitled—not just formally, but actually?

Caught in such a juridical concatenation, can the Petitioner, by appealing to the land's highest tribunal, obtain a meaningful enforcement of those rights which, theoretically at least, he shares with all other persons in these United States?

## REASONS FOR GRANTING THIS WRIT.

### POINT I.

**IT WAS A VIOLATION OF PETITIONER'S RIGHTS UNDER THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE POLICE, WITHOUT WARRANT AND WITH GUNS DRAWN, TO ENTER THE MOTEL UNIT, RENTED AND OCCUPIED BY THE PETITIONER, AND TO SEARCH FOR AND SEIZE CERTAIN ARTICLES THEREIN.**

Uncontroverted testimony at Petitioner's trial shows that the motel unit in question was rented to the Petitioner and a companion, and that they had an exclusive right of control of the premises at the time of the entry, search and seizure by the police. (T. 63)

It has been suggested by the prosecution that the officers, although without warrant, had a right to arrest the occupants at the time of entry, that they would have done so regardless of what was found in the motel unit, and that the search and seizure were lawful because they were "incidental to an arrest." It has also been suggested by the prosecution that the police were invited into the motel unit by the Petitioner, and that this "invitation" validated the search and seizure.

In Kerr v. California, 374 U.S. 23, the following applicable principles are ennunciated: 1. The Fourth Amendment forbids every search that is unreasonable, and protects those suspected or known to be offenders as well as the innocent. 2. In determining the lawfulness of entry and the existence of probable cause supporting an arrest without warrant, the court concerns itself only with what the arresting officers had reason to believe at the time of their entry. 3. A search is not made legal by

what it turns up; in law it is good or bad when it starts and does not change character from its success. 4. A lawful entry is the indispensable predicate of a reasonable search within the meaning of the Fourth Amendment. 5. Even if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door) are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

In U.S. v. Reincke, 229 F. Supp. 132 (1964) it was held that the defendant's "consent" to the search of his apartment "was merely acquiescence to the inevitable"—and, hence was not a voluntary waiver of his constitutional right to be secure against unreasonable search and seizure. The parallel to the instant case seems rather obvious, since in the instant case the alleged "consent" of the Petitioner was made in the face of an invasion by four armed officers with guns drawn, who entered "as nearly as possible together." The cited case further holds that the State had the burden of proving by clear and convincing evidence that the petitioner's consent to searches without a warrant of his person and apartment had been voluntarily and specifically given and was not the result

of actual or implied coercion. In the case against this Petitioner there could scarcely have been a greater degree of coercion than that which was shown by the evidence. Principles in accord with the Reincke case are also set forth in Simmons v. Bomar, 230 F. Supp. 226 (1964).

In Wong Sun v. U. S., 371 U.S. 471, it was held that the defendant was arrested without the officers having sufficient information to identify him as being the person sought. The case holds that an officer may not make an arrest in his own unchecked discretion upon information too vague . . . to permit a judicial officer to accept it as probable cause for an arrest warrant. As it relates to the case of the Petitioner herein, the evidence shows that the officers who entered the Petitioner's motel unit did not know for whom they were looking what they might find at the time of entry, and that the arrest when made was predicated on that which was found. Had the officers gone to a magistrate, seeking a warrant, what could they have provided, as shown by the evidence in this case, to justify the issuance of a warrant? They could have shown only that they had received a radio report that a robbery had taken place, that an automobile bearing a particular license number was reported as having been in some unspecified manner connected with the robbery, that a vehicle similar to the one described and bearing a similar (although not necessarily identical) license number had been located near a particular motel unit, and that word was received through the manager of the motel that his wife thought the vehicle referred to "was supposed

to be with the people in unit 18." What could be more vague? Would the facts given also have warranted an invasion, with guns drawn, of unit 17, in front of which the vehicle was parked? Or would the occupant's of unit 17 have been entitled to protection against such an invasion, even though the motel manager wasn't sure whether the vehicle about which inquiry was made was "with the people in unit 17 or unit 18"? It seems safe to say that a warrant shown to have been issued on such information would have been held to be invalid. And, in the instant case, we do not have the benefit of a magistrates judgment in the matter; but, instead, have only the officers' "own unchecked discretion." The Wong Sun case also indicates a principle, patently applicable to the instant case, in the syllabus which reads, "The history of the use, and not infrequent abuse, of the power to arrest, cautions that a relaxation of the fundamental requirements of probable cause would leave law-abiding citizens at the mercy of the officers' whim or caprice."

In Aguilar v. Texas, 12 L. ed 2nd 723, the court indicated that, where facts known to police officers would constitute sufficient evidence to justify the issuance of a search warrant, those same facts will not justify the officers in making a search without a warrant. In the Aguilar case a search warrant was obtained, but on facts insufficient to justify the issuance of a warrant. As it relates to the Petitioner's case, it will be noted that there were four officers who entered the Petitioner's motel unit, certainly a sufficient number to insure that the occupants would not flee while a warrant was being sought, and there is

no indication whatsoever that any evidence might have been destroyed during a delay in getting a warrant—especially since the officers had no idea what evidence they were seeking, nor did they have any knowledge of what might be destroyed. The Petitioner herein also asserts that the facts which could have been shown by the officers would not have been sufficient for the issuance of a valid warrant, let alone a search without a warrant.

The facts introduced into evidence at the Petitioner's trial, the facts related by the prosecution witnesses, paint a graphic and indisputable picture of an invasion of the Petitioner's temporary residence by gun-waving officers acting only on suspicion, very vague suspicion, and in violent opposition to the Petitioner's constitutional rights. The officers' own statements show that they entered to search, not to arrest, and that their knowledge was woefully inadequate to support either an arrest or search at the time of entry and at the time the search was begun, and that this invasion of the Petitioner's rights cannot be permitted, for to allow such actions by the police to go unchecked would be to nullify the constitutional provisions. There is not direct redress in most such cases, and the only means of discouraging such actions is for the courts to invalidate any conviction obtained by such means; thus, hopefully, discouraging police officers from making like invasions in the future.

## POINT II.

**IT WAS A VIOLATION OF PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE TRIAL COURT TO ADMIT INTO EVIDENCE THE FRUITS OF THE UNLAWFUL SEARCH AND SEIZURE.**

If the Court agrees with the Petitioner with respect to Point I, then the failure of the trial court to exclude evidence so obtained, evidence which is by its nature materially damaging to the cause of the defendant in a criminal action is surely no longer a matter which is a proper subject for dispute.

In Fahy v. Connecticut, 11 L. ed 2nd 171 (December, 1963) it was held that, in determining whether erroneous admission of unconstitutionally obtained evidence at defendant's trial in a state court was prejudicial so as to require reversal of his conviction of crime, the Supreme Court of the United States is not concerned with whether there was sufficient evidence on which the defendant could have been convicted without the evidence complained of; the question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. Since the prosecutor, in his brief to the Kansas Supreme Court, has argued that the Petitioner herein could have been convicted without the introduction of the evidence complained of as having been obtained by unlawful search and seizure, the principle set forth in the Fahy case has application—and especially so since the evidence complained of in your Petitioner's case included guns and ammunition, things which

are not only prejudicial, but inflamatory, by their very nature. In this matter Stoner v. California, 11 L. ed 2nd 856, where a gun and cartridges were also found, is obviously pertinent to the instant case.

In U. S. v. Reincke, 229 F. Supp. 132 (1964) it is described as "fundamentally unfair" for a state to convict a person on the basis of evidence obtained by means of an unjustified governmental invasion of his right to privacy of his person, property, and home, and a conviction so based is held to be without due process of law. The case further states that the court must indulge every reasonable presumption against a waiver of a constitutional right. As it relates to the case of the Petitioner herein, it seems that in the Petitioner's case the trial court indulged every presumption toward finding a waiver of constitutional rights by the Petitioner, despite evidence pointing to a situation fraught with coercion, fear, and submission.

In Massiah v. United States, 12 L. ed 2nd 246, it is said that evidence in an illegal search is excluded in criminal prosecutions, not because of the quality of the proof, but to secure meaningful enforcement of the Fourth Amendment.

In U. S. v. Reincke, 229 F. Supp. 132 (1964) it was held that the petitioner's failure to assert his constitutional right in his state court trial (i.e., his right under the Fourth Amendment) would not prevent him from asserting that right in federal habeas corpus proceeding following conviction. In the case of the Petitioner herein, of course, vigorous efforts to assert that right were made

in the trial court prior to the introduction of any testimony, repeatedly during the trial, at the conclusion of the case on a motion for acquittal, on his motion for new trial and in the oral argument thereon, in his appeal to the Supreme Court of Kansas, on his motion for rehearing in the Supreme Court of Kansas, and he is still trying to assert that right in this petition. Since the courts have held that the right is so precious that the failure to raise it in the trial court does not foreclose one from doing so later, surely the right will not now be denied to one who has sought to claim it at every stage of the proceedings. And, surely it will not be required that the petitioner must first wait until he is incarcerated in prison, in order to be accorded the recognition of his having been deprived of that right. Such an interpretation would scarcely be reasonable to the attainment of justice. Would it not be more in accord with due process, in furtherance of a meaningful enforcement of the rights granted under the constitution, to provide relief to the Petitioner now?

## POINT III.

**IT WAS A VIOLATION OF PETITIONER'S RIGHTS UNDER THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES FOR THE SUPREME COURT OF KANSAS TO REFUSE TO REVIEW ON ITS MERITS THE APPEAL OF THE PETITIONER.**

The "very brief factual statement," given by the Supreme Court of Kansas in its opinion, provides a measure of that court's degree of objectivity concerning the case of your Petitioner, particularly as revealed in the following:

> The court says that a description of the "get-away car" and its license number were broadcast by radio and that "the car in question" was traced to the parking lot of a motel in Wichita. (The fact is that there is nothing whatsoever in the evidence in this case to show that "the car in question" was a "get-away car," or in what manner, if any, it was connected with the robbery. It was not even established that the license number broadcast was the same as that on the car at the motel.)
>
> The court says, "Police officers ascertained from the manager of the motel that the car belonged to or had been used by men staying or visiting in one of the motel units." (Actually, according to the evidence, at the time the officers burst in upon the Petitioner, the only knowledge the officers had, concerning the car, was from the manager of the motel, who relayed to the police the information, from his wife who had retired for the night, that the car "was supposed to be with the people of unit 18," without even indicating whether they were men, women, or both. It was never established in the course of the trial to whom the car belonged or by whom it was used.)

> The court continues, referring to the police, "They went to that room and were admitted by defendant. Another man also was in the room." (The picture presented here can scarcely be said to convey an accurate representation of what the evidence shows to have happened—that the four officers, with guns drawn, charged in upon the Petitioner and two other men.)
>
> The court says, "Following a brief questioning the officers looked around the room . . . " (The evidence shows that the officers acknowledged that they entered for the purpose of searching—and that they did not ask even one question of the occupants before starting the search.)

This modification of the facts, so as to make the actions of the police appear in a better light, appears to the Petitioner as being indicative of bias on the part of the court, and is difficult to equate with an earnest desire to do justice.

If it can be shown that the Petitioner's error in his appeal was such as to mislead the appellee or the appellate court, or to leave them in the dark as to the basis for the appeal and the issues to be decided, or in any manner prejudice the position of the appellee by the error, then it is understandable that the error would be one of substance, one which should be dealt with quite stringently. If, on the other hand, no such showing is made, then it seems clear that the error was a formal and technical one only, that it was a harmless one, and that the appellate court should proceed to decide the case on its merits. And, if the error was only a formal and technical one, then the refusal of the appellate court to consider the case on its merits, especially in view of the grave matters involved, appears to the Petitioner to be violative of the

appellate court's duties as provided by the Constitution and Statutes of the State of Kansas, to constitute a denial of due process, and to be violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States. Also, if the Supreme Court of Kansas does not apply in all like cases the "rule" which it has invoked to harshly in the instant case, such exercise of arbitrary selectivity appears to the Petitioner to be a denial of equal protection under the law, constituting a violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

It is not difficult to find cases, many of them, in which the Supreme Court of Kansas has said, as it did in the case of your Petitioner, that the failure of an appellant to state and number as a "Specification of Error" the allegation, that the trial court erred in overruling his motion for a new trial, prohibited the appellate court from considering any trial errors that may have been committed, and asserting, in essence, "There is, therefore, nothing before us to decide." Interestingly, however, the same court has on numerous occasions, despite an appellant's failure to include those "magic words", proceeded to examine the case on the points raised and to decide the case on its merits. This has even been done in some cases where no motion for new trial was ever made, or where no mention of the overruling of a motion for new trial was included in the Notice of Appeal.

The Constitution of Kansas, Judicial, Article 3, provides:

> The supreme court shall have . . . such appellate jurisdiction as may be provided by law.

Pursuant to this, presumably for the purpose of effectuating a system designed for the orderly attainment of justice, the following pertinent laws were enacted, appearing in the General Statutes of Kansas, 1949, and numbered as indicated:

> 62-1701 An appeal to the supreme court may be taken by the defendant as a matter of right from any judgment against him; and upon the appeal any decision of the court or intermediate order made in the progress of the case may be reviewed.
>
> 62-1718 On an appeal, the court must give judgment without regard to technical errors or defects, or to exceptions which do not affect the substantial rights of the parties.
>
> 62-1719 An appeal shall not be dismissed for any informality or defect in the taking thereof. If the same be corrected in a reasonable time after an appeal has been dismissed, another appeal may be taken.
>
> 62-1716 The appellate court may reverse, affirm or modify the judgment appealed from, and may if necessary or proper order a new trial . . .
>
> 62-1603 The court may grant a new trial . . . when . . . the court has admitted illegal testimony . . .
>
> 62-1801 The provisions of this code . . . shall . . . be applicable to any . . . court of record exercising criminal jurisdiction . . .
>
> 62-1726 The supreme court shall have authority to make such additional rules, not repugnant to statute, as it may deem necessary or proper in order to facilitate the prompt and orderly preparation and presentation of the appeal and to carry into effect the final order of the court in such appealed actions.

It seems inconceivable, however, that the statute authorizing the court to make additional rules should intend that those rules take on an inflexibility so as to thwart

justice where only a matter of form is involved—and, surely, if such additional rules as the court may adopt are to be used against a defendant in a criminal case, it would be expected that such would be used uniformly and without discrimination against certain selected defendants. Also, as a principle of criminal law so time-honored as to appear beyond dispute, any statute or rule, where any ambiguity exists, must be interpreted most favorably toward a defendant in a criminal action.

The appeal of this Petitioner to the Supreme Court of Kansas was decided solely on Petitioner's alleged failure to comply with Rule No. 5 of the Rules of the Supreme Court of Kansas, revised May 1, 1959, specifically with that portion of said rule which reads as follows: " . . . The appellant's abstract shall include a specification of the errors complained of, separately set forth and numbered . . . " It is noted in a very careful reading of this rule that it nowhere states that, in order for the appellate court to consider trial errors, one of the errors specified must be to the effect that the trial court erred in overruling the defendant's motion for a new trial. The Petitioner contends that, where the appellee and the court are fully apprised, actually, of the nature of the appeal and the basis upon which it is taken, the inclusion of such an item under the heading of Specifications of Error is, in effect, mere surplusage. It also seems patent that a strict enforcement of this rule, as was done in the Petitioner's case, is repugnant to the statutes cited above and to the philosophy of the rule itself, which was interpreted in

State v. Young, 190 Kan. 403, as being " . . . designed to promote . . . fairness . . . "

Rule 5 of the Supreme Court of Kansas is quite comparable to Rule 9 of the United States Supreme Court, is apparently designed with the same purpose, and on occasion has been interpreted in a like manner; i.e., that, despite normal adherence to the rule, the court may act upon "plain error" which it observes, whether specified by the defendant or not. (State v. Andrews, 187 Kan. 458).

Rule 9 of the Supreme Court of the United States says, "Where an appeal is taken to this court from any court, the appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors, which shall set out separately and particularly each error asserted. No appeal shall be allowed unless such an assignment of errors shall accompany the petition."

Despite the strong language of Rule 9, it has been interpreted so as to take into account the purpose of the rule and the fact that it should not be inflexible when such rigidity clearly would not further the cause of justice. The object of the rule, as stated in Phillips & Colby Construction Co. v. Seymour, 91 U.S. 648, is to enable the court and opposing counsel to see on what points plaintiff's counsel intend to ask a reversal of the judgment and to limit the discussion to those points. However, the Supreme Court held in Nickey v. State of Mississippi, 292 U.S. 393, that it could review questions of infringement of the due process clause of the Fourteenth Amendment, discussed in the State Supreme Court, though questions

were not presented to State Supreme Court by assignment of errors as required by its rules.

Also, in interpreting Rule 9, the Supreme Court has held that an assignment of error is not necessary to give the court, on appeal, authority to notice a plain error. (U. S. v. Tennessee & C. R. Co., 176 U.S. 242). In United Brotherhood of Carpenters and Joiners of America v. United States, 330 U.S. 395, is was held that the Supreme Court possesses power to notice a "plain error" though it is not assigned or specified; and, in Mahler v. Eby, 264 U.S. 32, it is again noted that the Supreme Court may notice a plain and serious error, though unassigned. Hence, as with any rule, it appears to be recognized that a rule of reason must prevail, must take precedence over a blind and narrow interpretation and rigid enforcement.

In State v. Shehi, 125 Kan. 210, which the Supreme Court of Kansas cited in its decision in Petitioner's case, the adherence to the strict enforcement of the rule was explained as follows, "This court has no means of knowing that any of the objections to the proceedings urged here were called to the attention of the district court by motion for a new trial." In Petitioner's case, of course, the situation is wholly different, since the record shows that the matters now urged were urged repeatedly and at every stage of the proceedings.

With what uniformity does the Supreme Court of Kansas apply this rule with the strictness with which it was applied in your Petitioner's case? Not very uniformly, it seems.

In State v. Brown, 145 Kan. 247, the Court says, "As the record in this case fails to show a specification of errors, and as the overruling of the motion for a new trial is not assigned as error, there is a grave question whether there is anything before this court for review . . . Notwithstanding this state of the record we have examined with attention the abstract and briefs of counsel."

In the case of State, ex rel. v. Miller, 177 Kan. 324, the court held that the failure to specify as error the denial of a motion for a new trial did not preclude review of the questions of law involved in the case, but only limited the scope of the consideration, and the court proceeded to review the questions of law involved; or, in other words, decided the case on its merits.

In State v. Trinkle, 186 Kan. 809, the court "applied the rule"; but, on page 812 stated, "Application of the rule, however, does not preclude review of the complaint that the verdict is not sustained by sufficient evidence." The court thereupon proceeded to examine the case and to decide it upon that basis.

In State v. Spencer, 186 Kan. 298, the appellant appealed from the order overruling his motion for a new trial, but did not include that ruling as a specification of error. This was a case in which there was a conviction of murder in the first degree. In that case the court recognized this omission; but, because of the nature of the case and the sentence imposed, stated that they would go ahead and consider all of the contentions made—and did proceed to do so.

In State v. Andrews, 187 Kan. 458, also a capital case, the Court said, "In such an appeal, this court will not feel itself confined by technical rules and would notice any 'plain error' whether specified by defendant or not." The clear reference to "technical rules" is of particular interest, of course, in its relationship to the statutory provisions previously cited.

There does not seem to be any provision, in the statutes or in the rules of the court, for making a distinction between capital cases and other cases with respect to the rules to be applied in the taking of an appeal.

In a misdemeanor case, a "drunk driving" case, State v. Grimes, 193 Kan. 294, decided essentially contemporaneously with Petitioner's case, the appellant did not assign as error the overruling of motion for new trial. The appellee challenged the appellant's right to be heard, pointing out on page 12 of appellee's brief, "It will be noted that there is no Specification of Error to the effect that the Trial Court erred in its overruling of the Motion for New Trial." Nevertheless, the Court proceeded to hear the case on its merits—and even states in its opinion ". . . the district court did not err in overruling the motion for a new trial." Since the opinion of the Supreme Court of Kansas does not refer to the omission of those words, which have been held in the Petitioner's case to be so important, it was only by chance that the Petitioner herein knew of this case. How many other such cases there may be, where the Supreme Court of Kansas proceeded with the consideration of a case on its merits, despite a deficiency which has been found in Pe-

titioner's appeal to be fatal, could be ascertained only by an extended examination of appellate briefs.

An examination of the cases reveals that the Supreme Court of Kansas has not given uniform application to the rule which it now has applied to Petitioner's case with such strictness and severity that he faces a term of imprisonment. It seems clear, too, that this strict and severe application of the rule is wholly counter to the purpose for which it was allegedly designed, that such an application is contrary both to the letter and the spirit of the Constitution and Laws of the State of Kansas, and that the application of that rule, as it was applied in the case of your Petitioner herein, constitutes a deprivation of Petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

## CONCLUSION.

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari should issue.

DONALD I. MITCHELL,
802 Schweiter Bldg.,
Wichita, Kansas;

RUSSELL SHULTZ,
LARRY KIRBY,
JAMES NELSON,
331 South Hydraulic,
Wichita, Kansas;

Counsel for Petitioner.

## APPENDIX A.

No. 43,859

THE STATE OF KANSAS,
*Appellee,*

v.

CONVERS E. MARSH,
*Appellant.*

### SYLLABUS BY THE COURT.

In order for this court to review alleged trial errors in a criminal prosecution, such as rulings on the admission or exclusion of evidence, it is required that the defendant appeal from the order overruling his motion for a new trial and that such ruling be specified as error, and this is true even though it be argued by defendant that his rights under provisions of the federal constitution were violated because of an alleged unlawful search and seizure.

Appeal from Sedgwick district court, division No. 5; James J. Noone, judge. Opinion filed June 6, 1964. Affirmed.

*Russell Shultz,* of Wichita, argued the cause and was on the brief for the appellant.

*J. O. Ballinger,* Deputy County Attorney, argued the cause, and *William M. Ferguson,* Attorney General, and *Keith Sanborn,* County Attorney, were with him on the brief for the appellee.

The opinion of the court was delivered by

Price J.: This is an appeal from a conviction of robbery in the first degree.

In view of the limited questions presented by the record, and because of our disposition of the case, a very brief factual statement will suffice.

At about 11:45 on the night of May 6, 1963, two men entered a supermarket in the city of Wichita. One of them was brandishing a revolver. They informed two employees of the store—a stockman and the assistant manager— "that it was a holdup—and to get the money out and put it in a sack." One of the robbers—later identified as the defendant—fired a shot, but no one was hit. Approximately $930 was taken in the robbery. Immediately after the robbers left the store one of the victims called the police.

Within minutes thereafter a description of the "getaway" car and its license number were broadcast by radio. As a result of this fact and alertness on the part of the police department, within about thirty to forty-five minutes after the robbery the car in question was traced to the parking lot of a motel in Wichita. Police officers ascertained from the manager of the motel that the car belonged to or had been used by men staying or visiting in one of the motel units. They went to that room and were admitted by defendant. Another man also was in the room. Following a brief questioning the officers looked around the room and, among other things, found a revolver and considerable currency. A considerable amount of currency also was found on defendant's person. Defendant and his companion were placed under arrest and taken to the police station. An hour or two later both of them were positively identified in a police "line-up" by the store employees as being the men who had entered the store and held them up two or three hours earlier.

Throughout his trial on charges of robbery in the first degree defendant's counsel objected to the introduction into evidence of the revolver, money, and other items found in the motel room on the ground that they were the result of an illegal search and seizure in that at the time and place in question the police officers had no search warrant.

The objections were overruled. The jury returned a verdict of guilty as charged. Defendant filed a motion for a new trial, alleging:

> "1. That the Court has admitted illegal testimony, the re-reading of testimony of two States' witnesses in its entirety, and for newly discovered evidence.
>
> "2. That the Court has mis-directed the jury in the material matter of law.
>
> "3. That the verdict is contrary to the law or evidence."

The motion was overruled, and defendant filed his notice of appeal from the judgment and sentence and from the order overruling his motion for a new trial.

In due course the appeal was set for hearing on April 9, 1964, at the regular April session of this court.

On March 16 defendant filed his combined abstract and brief in the office of the clerk of this court. His abstract contained only two specifications of error as follows:

> "1. Was the search and seizure made at the motel room of the appellant unlawful, and was the evidence thereby seized inadmissable because no search warrant was obtained?
>
> "2. Conceding, for the sake of argument only, that the search and seizure was not unlawful and the evidence thereby seized was not inadmissable because

> of an unlawful search and seizure, then and in that event the evidence which was admitted over objection of this appellant was still inadmissable as there was no showing that the items introduced were the fruits of any crime, that they belonged to the defendant or that they were in any way relevant to the issues in this case."

It is to be noted that defendant did not include in his specifications of error the order overruling his motion for a new trial.

The files of the clerk of this court disclose that on April 3 defendant's counsel was served with a copy of the state's brief and that it was filed with our clerk on April 4. In its brief the state challenged the right of defendant to be heard on appeal, its contention being that because of defendant's failure to specify as error the order overruling his motion for a new trial—rulings on the admission and exclusion of evidence are not subject to appellate review.

On the morning of April 9, just a few moments before this appeal was called for hearing, defendant's counsel filed with the clerk of this court a motion requesting permission to correct a typographical error (not here material) in his brief, and for leave to amend his specifications of error by adding thereto that the trial court erred in overruling the motion for a new trial. At the bottom of this written motion was a typed "consent," dated April 8, signed by the deputy county attorney assigned to the case. During the oral argument of the appeal the deputy county attorney advised us that late in the afternoon of the previous day, in Wichita, defendant's counsel had

handed the motion to him and that by signing the typed-in "consent" he meant that he was merely consenting to the belated filing of the motion and did not consent to the request for permission to amend and add to the specifications of error.

We granted the request to correct the obvious typographical error in the brief. The request to amend the abstract by adding the additional specification of error was taken under advisement. The appeal was orally argued by both sides.

An identical question was presented in *State v. Hamilton,* 185 Kan. 101, 340 P.2d 390, certiorari denied, 361 U.S. 920, 4 L.ed. 2d 188, 80 S. Ct. 265. There the defendant appealed from the order overruling his motion for a new trial but failed to specify the order as error. Upon oral argument of the appeal his counsel, for the first time, requested permission to amend and enlarge the specifications of error so as to include the overruling of the motion for a new trial. It was held that in the interest of orderly procedure on appellate review the request came too late, and it was denied.

In *State v. Young,* 190 Kan. 403, 375 P. 2d 783, the defendant appealed from the order overruling his motion for a new trial. His abstract contained four specifications of error relating to alleged trial errors—but failed to specify as error the overruling of his motion for a new trial. The appeal was set for hearing on September 24. On September 22 defendant, for the first time, requested permission to amend and enlarge the specifications of

error so as to include the order overruling the motion for a new trial. The request was denied.

We adhere to the rule and reasoning of the foregoing cases and hold that under the facts and circumstances defendant's application to amend and enlarge the specifications of error must be denied.

The firmly-established rule in this State is that in order for this Court to review alleged trial errors in a criminal prosecution it is required that the defendant appeal from the order overruling his motion for a new trial, and, in addition thereto, such ruling must be specified as error. We cite but a few of the many decisions in which the rule has been applied: *State v. Shehi,* 125 Kan. 110, syl. 2, 263 Pac. 787; *State v. Pore,* 143 Kan. 344, syl. (4), 55 P.2d 348; *State v. Owen,* 161 Kan. 361, 168 P.2d 917; *State v. Turner,* 183 Kan. 496, syl. 1, 328 P.2d 733, appeal dismissed for want of a substantial federal question, 359 U.S. 206, 3 L.ed 2d 759, 79 S.Ct. 739; *State v. Hamilton,* above; *State v. Lewis,* 187 Kan. 221, syl. 1, 356 P. 2d 845; *State v. Bednark,* 187 Kan. 236, 237, 356 P. 2d 848; *State v. Jones,* 187 Kan. 318, syl. 1, 356 P.2d 843; *State v. Armstrong,* 188 Kan. 567, 569, 363 P. 2d 520; *State v. Schneider,* 188 Kan. 808, 366 P. 2d 27; *State v. Young,* above, and *State v. Falder,* 191 Kan. 150, 379 P.2d 296.

The only specifications of error urged by defendant relate to the admission in evidence of the revolver, currency, and other items found in defendant's possession shortly after the robbery. Rulings on the admission or exclusion of evidence during the course of a trial are within the category of alleged trial errors. Because of

defendant's failure to specify as error the order overruling his motion for a new trial appellate review of those rulings is precluded. This is true, as was held in the recent case of *State v. Aeby*, 191 Kan. 333, 381 P.2d 356, even though it is argued by defendant that his rights under provisions of the federal constitution were violated because of an alleged unlawful search and seizure. In that case the defendant neither appealed from the order overruling his motion for a new trial nor did he specify the ruling as error. In paragraph 3 of the syllabus it was held:

> "Where a defendant appeals from the judgment and sentence of his conviction and attempts to raise a matter relating to the admission or exclusion of evidence, which is a trial error, such matter may be reviewed only where the appeal is from the order overruling the motion for a new trial and such ruling is specified as error in conformity with Rule No. 5 of this court, and the fact that a claimed federal right is presented does not preclude this court from refusing to decide the federal question and applying adequate and independent well-settled state rules relating to appellate procedure."

In support of the rule just quoted the opinion cites numerous decisions of the Supreme Court of the United States. The opinion closes with this statement:

> "We rest our decision in this case upon the appellant's failure to invoke and apply the adequate and easily complied-with rules of this court relating to appellate procedure and do not pass upon the merits of the case or upon the correctness of any of the rulings

> of the district court. Appellate jurisdiction in this instance was not invoked in accordance with those rules, and we here deny no federal right since there was no federal question before us for decision." (p. 337.)

We know of no reason why the reasoning and rule of that case should not be followed.

The judgment is affirmed.

Office Supreme Court, U.S.
FILED
JAN 11 1965
JOHN F. DAVIS, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964.

## No. 758

CONVERS E. MARSH,
*Petitioner,*

vs.

STATE OF KANSAS,
*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM M. FERGUSON,
Attorney General of Kansas,
J. RICHARD FOTH,
Assistant Attorney General of Kansas,
Statehouse, Topeka, Kansas,
*Attorneys for Respondent.*

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City, Mo. 64106, HArrison 1-3080

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IN THE

# SUPREME COURT OF THE UNITED STATES

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## No. 758

CONVERS E. MARSH,
*Petitioner,*

vs.

STATE OF KANSAS,
*Respondent.*

### RESPONDENT'S BRIEF IN OPPOSITION

The petitioner is seeking a writ of certiorari to the Supreme Court of Kansas to review the decision of that court affirming his conviction for the crime of robbery in the first degree in the District Court of Sedgwick County, Kansas.

### OPINION BELOW

The opinion of the Supreme Court of Kansas is reported at 193 Kan. 302, 392 P.2d 953 (1964), and appears in the record beginning at page 25.

## JURISDICTION

The petitioner seeks to have this court accept jurisdiction under 28 U.S.C. §1257 (3).

## QUESTIONS PRESENTED

Does the decision below rest on an adequate and independent state ground?

Was the evidence used against petitioner obtained by an illegal search?

## STATEMENT OF FACTS

On October 9 and 10, 1963, the petitioner was tried before a jury in the District Court of Sedgwick County, Kansas, on a charge of armed robbery (R. 2). Before the introduction of any evidence, petitioner's retained counsel entered a general objection to the admission of any evidence obtained from the search of Room 18 at the Sunset Motel in Wichita, Kansas, on May 7, 1963, on the ground that that search and seizure were made in violation of petitioner's rights under the United States Constitution (R. 8). Before the introduction of this evidence or any testimony concerning it, extensive argument was made to the court, out of the presence of the jury, concerning this objection. However, the objection was overruled on the ground that the evidence was obtained as the result of a search made incidental to a lawful arrest (R. 13).

The testimony, as abstracted by petitioner for the court below, shows that on May 6, 1963, at 11:45 p.m. two men held up the Dillon Super Market in Wichita. One of them fired a gun during the course of the holdup, but

did not hit anyone (R. 10). A few minutes after the robbery occurred it was reported over the local commercial broadcasting stations. Police officers received this report and also received "a description of the automobile involved and the license number" (R. 12). At approximately 12:30 a.m. on May 7, 1963, 45 minutes after the robbery took place, police officers had located a car bearing this description at the Sunset Motel in Wichita and had verified the type, color and license number of the automobile (R. 12). They asked the manager of the motel which room the car belonged to and he said he was not sure whether it was Room 17 or Room 18 (R. 12). However his wife informed the officers that it belonged to Room 18 (R. 11).

At this point four officers of the Wichita police department had assembled at the motel (R. 17). Officer Flowers knocked on the door with his gun, and a man's voice inside asked who it was. He replied, "Flowers." They asked him again who it was, and he said, "The police." The door was then opened from the inside, and one of the men inside gestured the officers in (R. 13). The officers entered together with their guns drawn (R. 17). There were three men in the room, one of them being the petitioner (R. 13). As soon as the officers were inside, petitioner asked them what they wanted (R. 14). He was very nervous (R. 17). He was told that the officers wanted to check something out (P. 17). When he started to take a drink of whiskey, he was told to set it down and leave it alone until the officers were finished (R. 14). The officers then began a search of the room; they found ammunition for an automatic in the closet and a P-38 automatic in one drawer of the dresser (R. 14). At this point handcuffs were placed on the petitioner (R. 15). One hundred nineteen dollars in currency was taken from his

person together with a .38 cartridge. Another one of the occupants of the room, Morrell, was also searched at this time and currency was found in his pockets also (R. 14). All three men were promptly taken to the police station (R. 16). The officers then checked the suitcases at the motel, found them to contain currency and change as well as a revolver (R. 17 and 18) and took the suitcases with them to the police station (R. 17). The gun found in the dresser, the cartridge and currency taken from the petitioner's person and the gun and money found in the suitcases were introduced into evidence at petitioner's trial (R. 15, 16, 18).

The testimony showed that petitioner rented the motel room at 7:00 a.m. on the day of the robbery and that he was driving a white convertible. The car identified by police that night was a stationwagon, which had arrived at the motel in mid-afternoon, driven by another man who went into Room 18 (R. 11).

Positive identification of the petitioner as one of the robbers was made by two employees of the supermarket present at the time of the robbery (R. 8-10). At the close of the state's evidence, counsel for petitioner stated that he would not present any evidence but would stand "upon his right" (R. 19). The jury returned a verdict of guilty (R. 19). Petitioner's motion for a new trial was overruled (R. 3) and on October 23, 1963, petitioner was sentenced to a term of not less than ten nor more than twenty-one years (R. 4).

One of the grounds of petitioner's motion for a new trial was that "the court has admitted illegal testimony" (R. 19). Petitioner's notice of appeal stated that he was appealing from the order of the court overruling his motion for a new trial (R. 21). His abstract of the record

filed in the Supreme Court of Kansas, however, contained only two specifications of error—(1) that the evidence obtained at the motel was unlawfully seized and (2) that it was not properly identified (R. 22). No specification was made that the trial court erred in overruling the motion for new trial.

On April 3, petitioner's counsel was served with a copy of the state's brief containing a challenge to the right of the defendant to be heard because he had not specified as error the order overruling his motion for new trial, as required by the rules of the Kansas Supreme Court (R. 28). On April 9, 1964, just a few moments before the appeal was called for oral argument, counsel for petitioner filed with the clerk of the Kansas Supreme Court a motion requesting permission to amend his specifications of error by adding that the trial court erred in overruling his motion for a new trial (R. 28). The Kansas Supreme Court heard oral argument on the merits of the case, reserving the question of permission to amend the specifications of error. In its opinion, filed June 6, 1964, the court denied this permission and accordingly held that the claim of illegally seized evidence was not open to consideration on appeal because of the court's well-established rule that trial errors will only be reviewed where the defendant appeals from the order overruling his motion for a new trial and, in addition, specifies such ruling as error (R. 30).

Petitioner then made application to this court for a writ of certiorari.

## REASON CERTIORARI SHOULD BE DENIED

### I. The Decision Below Rests on an Adequate and Independent Ground of State Law.

The Supreme Court of Kansas, in affirming petitioner's conviction, did not pass on his claim that evidence used against him was illegally seized. Rather, it held that this claim was not open for consideration on appeal because of petitioner's failure to specify as error the trial court's order overruling his motion for a new trial. In so doing the court was applying its old and well known rule that one who seeks review of "trial errors" on appeal is required to appeal from the order overruling his motion for a new trial, and, in addition thereto, specify such ruling as error. It is undisputed that petitioner's abstract of the record in the Supreme Court of Kansas did not contain a specification of error regarding the order overruling his motion for new trial. No request to correct this omission was made until the morning of April 9, 1964, just a few moments before the appeal was called for hearing (R. 28). In accordance with its prior decisions, the court held that this application came too late and denied the request (R. 29).

The decision thus rests on an adequate and independent ground of state law and the federal claim made by the petitioner is not open to review in this Court. *Murdock* v. *Memphis,* 20 Wall. 590, 636 (1875); *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935).

There can be no doubt to as the adequacy of the state procedural rule applied in this case. It is one of long standing in Kansas. See *State* v. *Shehi,* 125 Kan. 110, 263 Pac. 787 (1928). It is also one well known to the bar of Kansas, because of its frequent application. See cases cited

in the opinion below at 193 Kan. 305; and *State* v. *Smith*, 193 Kan. 299 (1964); *State* v. *Adams*, 193 Kan. 523 (1964); *State* v. *Ryan*, 193 Kan. 673 (1964). This is not a case like *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, where a state procedural bar to a federal claim was hidden until it was too late for compliance.

Moreover, this rule has been uniformly applied by the Kansas court, in all but capital cases. In the latter, the court has felt constrained because of the nature of the punishment imposed to notice any "plain error" whether specified by the defendant or not. *State* v. *Andrews*, 187 Kan. 458, 459, 357 P.2d 739 (1960); *State* v. *Spencer*, 186 Kan. 298, 302, 349 P.2d 920 (1960). In all other cases the rule has been applied with consistency. Petitioner argues in his brief that this is not so and cites cases such as *State* v. *Grimes*, 193 Kan. 294 (1964), decided the same day as petitioner's case; *State* v. *Trinkle*, 186 Kan. 809, 352 P.2d 937 (1960); and *State ex rel.* v. *Miller*, 177 Kan. 324, 279 P.2d 223 (1955). However, the errors reviewed in those cases were not *trial errors;* and it is only trial errors which must be raised by specifying that it was error to overrule the motion for a new trial. The claim made by this petitioner, that evidence was erroneously admitted against him, is a classic claim of "trial error" within the meaning of this rule. See *State* v. *Aeby*, 191 Kan. 333, 335, 381 P.2d 356 (1963); *Jeffers* v. *Jeffers*, 181 Kan. 515, 517-18, 313 P.2d 233 (1957); *Morgan* v. *Morgan*, 146 Kan. 880, 73 P.2d 1105 (1937); *Nesbit* v. *Hines*, 17 Kan. 316 (1876).

On the other hand where the facts are undisputed, as in *State ex rel.* v. *Miller, supra*, the trial court's decision on a question of law may be reviewed without the necessity of a motion for new trial or a specification in the Supreme Court that the motion was erroneously overruled. *Marion County Comm'rs* v. *Clark*, 157 Kan. 132, 134, 138 P.2d 449

(1943). Likewise, it is well settled in Kansas that a claim that the verdict in a criminal case is not supported by sufficient evidence is not a claim of "trial error" and therefore may be reviewed on appeal without a specification that the motion for new trial was erroneously overruled. *State* v. *Smith*, 193 Kan. 299, 300 (1964); *State* v. *Trinkle*, 186 Kan. 809, 812, 352 P.2d 937 (1960). Although not expressly mentioned in the opinion, this is obviously the reason that the court in *State* v. *Grimes*, 193 Kan. 294 (1964) proceeded to review the appellant's claim of error, which related solely to the sufficiency of the evidence to support the conviction.

There is therefore no conflict between the decision in this case and prior state decisions, as was the case in *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449 (1958) and *Staub* v. *Baxley*, 355 U.S. 313 (1958).

The state rule applied in this case is a reasonable procedural requirement designed to assure that the bench and bar will understand what claims of error are being made on appeal. It is a well known rule of long standing, which has been consistently applied by the Supreme Court of Kansas. Nothing whatsoever has been presented to this Court which indicates that the state court arbitrarily invoked this rule in petitioner's case in order to avoid a decision on his federal claim. The rule therefore constitutes an adequate and independent state ground for the decision below. *Wolfe* v. *North Carolina*, 364 U.S. 177, 195 (1960); *Nickel* v. *Cole*, 256 U.S. 222, 225 (1921); *John* v. *Paullin*, 231 U.S. 583, 585 (1913).

## II. The Search of Petitioner's Motel Room Was Made Incident to a Lawful Arrest.

In this case the arrest of the defendant and the other two occupants of the motel room took place immediately

upon the entry of the police officers. Four officers entered the room at the same time with guns drawn (R. 17). Although they did not say in so many words, "You are under arrest," they took complete charge of the room and everything in it. They did not permit the petitioner to take a drink of whiskey which he had available in the room (R. 14). There is no question but that if any of the three occupants of the room had tried to leave he would have been prevented from doing so. In short, their freedom of movement was completely restricted as soon as the police officers entered the room. This was therefore the time when the arrest occurred. *Henry* v. *United States*, 361 U.S. 98, 100, 103 (1959). This is true even though a "formal arrest" took place at a later time. For, as the *Henry* case shows, the police officers' own notions of the exact time of arrest are unimportant.

Although the officers had no arrest warrant at the time they entered the motel room, it is clear that they had probable cause to arrest the occupants of the room. The decisions of this Court indicate that probable cause exists whenever the facts and circumstances within the knowledge of the officers or of which they have reasonably trustworthy information are sufficient to warrant a reasonable man in a belief that an offense has been committed by the person arrested. *Ker* v. *California*, 374 U.S. 23, 34-5 (1963); *Henry* v. *United States*, 361 U.S. 98, 102 (1959). In this case, the police officers who made the arrest received by commercial radio broadcast a report that a robbery had just been committed (R. 15). Immediately after this they received by radio from police headquarters a "description of the automobile involved and the license number" (R. 12). Within minutes they had located the automobile parked at a motel and had verified the type, color, and license number (R. 12). They inquired of the

motel manager which room the automobile belonged with. He was not sure whether it was Unit 17 or 18, but his wife informed them that it was with the people in Unit 18 (R. 11, 12). This occurred approximately 45 minutes after the robbery took place (R. 12). At this point, reasonable men in the shoes of these officers, and having the information which they had, would have concluded that the persons in Room 18 had perpetrated the robbery, driven the car to their room and were in the midst of a rendezvous after the robbery. A reasonable man would not expect to find innocent persons in that room. *Cf. Ker* v. *California*, 374 U.S. 23, 37 (1963).

Defense counsel in questioning the officers at the trial, dwelt at length upon their opinions as to when the arrest took place and as to the basis which they had for making the arrest. However, their opinions on these matters are beside the point. These are questions of law, which must be answered by the Court.

Having arrested the occupants upon entering the motel room, the officers proceeded to make a search incident to that lawful arrest. It is well settled that such a search may be made for weapons and for fruits or instrumentalities of the crime. *Preston* v. *United States*, 376 U.S. 364, 367 (1964). The only complaints made by petitioner in the court below regarding evidence introduced at his trial related to revolvers, ammunition, and currency (R. 15, 16, 18), taken from the motel or its occupants at the time of the arrest. These items were obtained in a search made less than an hour after the commission of the crime and at 12:30 a.m. A search of the immediate premises upon which the defendant is arrested is justified under these circumstances in view of the danger that evidence will be destroyed and the difficulty of obtaining a warrant at such a late hour. See *Ker* v. *California*, 374 U.S. 23, 42 (1963).

## CONCLUSION

The decision of the court below rests on an adequate and independent ground of state law. Furthermore the evidence complained of was obtained in a search made incident to a lawful arrest. For both these reasons, the claim of constitutional violation is without substance and the writ of certiorari should be denied.

Respectfully submitted,

WILLIAM M. FERGUSON,
Attorney General of Kansas,
J. RICHARD FOTH,
Assistant Attorney General of Kansas,
Statehouse, Topeka, Kansas,
*Attorneys for Respondent.*